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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte THOMAS DANIEL,
ULRICH RIEGEL, and MARK ELLIOTT

Appeal 2008-6014
Application 10/521,292
Technology Center 1700

Decided: February 25, 2009

Before TERRY J. OWENS, JEFFREY T. SMITH, and MARK NAGUMO,
Administrative Patent Judges.

Opinion Dissenting-in-Part filed by *Administrative Patent Judge* OWENS.

Opinion Dissenting-in-Part filed by *Administrative Patent Judge* SMITH.

NAGUMO, *Administrative Patent Judge*.

DECISION ON APPEAL
STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-10, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

The Invention

The Appellants claim a process for producing a sodium acrylate polymer from solid sodium acrylate dispersed or dissolved in an aqueous medium. Claim 1 is illustrative:

1. A process for producing a sodium acrylate polymer by a free-radical polymerization of sodium acrylate with or without other monomers in an aqueous medium, which comprises using solid sodium acrylate in an aqueous solution or dispersion by dissolving or dispersing the solid sodium acrylate in the aqueous medium.

The Reference

Tsubakimoto 4,286,082 Aug. 25, 1981

The Rejections

The claims stand rejected over Tsubakimoto as follows: claims 1-5 and 8-10 under 35 U.S.C. § 102(b), and claims 6 and 7 under 35 U.S.C. § 103.

OPINION

We reverse the rejection under 35 U.S.C. § 102(b) and affirm the rejection under 35 U.S.C. § 103.

Rejection under 35 U.S.C. § 102(b)

“Anticipation requires that every limitation of the claim in issue be disclosed, either expressly or under principles of inherency, in a single prior art reference.” *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1255-56 (Fed. Cir. 1989).

We need to address only the independent claims, i.e., claims 1 and 9.

Issue

Have the Appellants shown reversible error in the Examiner's determination that Tsubakimoto discloses, expressly or inherently, the process of dissolving or dispersing solid sodium acrylate in an aqueous medium (claim 1), or dissolving solid sodium acrylate in water (claim 9)?

Findings of Fact

Tsubakimoto discloses (col. 1, l. 53 – col. 2, l. 2):

an adsorbent resin composition obtained by copolymerizing in an aqueous solution a mixture of 100 parts by weight of an acrylate salt monomer (B) composed of 0 to 50 mol% of acrylic acid and 50 to 100 mol% of an alkali metal acrylate and 0.001 to 5 parts by weight of a crosslinkable monomer (C) having 2 to 4 groups selected from the group consisting of $\text{CH}_2=\text{CHCO}-$, $\text{CH}_2=\text{C}(\text{CH}_3)\text{CO}-$, and $\text{CH}_2=\text{CH}-\text{CH}_2-$ in the molecule in the presence of at least one surface-active agent (A) selected from the group consisting of water-soluble surface-active agents and water-dispersible surface-active agents in the presence of a water-soluble radical polymerization initiator while maintaining the initial concentration of said mixture in the range of from 25% by weight to saturation, and then drying the resulting gel-like hydrous polymer under heat....

Tsubakimoto's preferred alkali metal is sodium (col. 3, ll. 46-50). In Tsubakimoto's examples, acrylate salt monomer (B) is in an aqueous solution (col. 7, ll. 32-36).

Analysis

The Appellants argue that “[b]ecause a reference *must* teach *every* element of a claim in order for the reference to anticipate the claim, because the identical invention must be shown *in as complete a detail* as is contained in the claims, and because the '082 patent fails to teach or suggest using

solid sodium acrylate to form the monomer solution, as presently claimed, the '082 patent cannot anticipate claims 1-5 and 8-10 (Br. 12).

The Examiner argues (Ans. 7):

As a matter of fact, there are only two main ways of the preparation of an aqueous solution of sodium acrylate:

1. mixing aqueous sodium hydroxide with acrylate acid, or
2. dissolving commercially available solid sodium acrylate, 97% [7446-81-3] (acrylic acid, sodium salt), FW 94.05, mp>300°C in an aqueous medium.

Therefore, as per **In re Schaumann**, 572 F.2d 312, 197 USPQ 5 (CCPA 1978), when the reference teaches a small genus (two species in this application) which [sic, the reference] places a claimed species in the possession of the public.

In *Schaumann*, the reference to Hildebrandt disclosed a class of b-(metahydroxyphenyl)-isopropylamines that encompassed Schaumann's claimed DL-1-(3-hydroxyphenyl)-2-ethylaminopropane (HEP). *Schaumann*, 572 F.2d at 313. Hildebrandt claimed, in claim 1, a compound that differed from Schaumann's claimed compound only in an amino group having, broadly, a lower alkyl radical, rather Schaumann's specific lower alkyl radical, i.e., ethyl. *Schaumann*, 572 F.2d at 314. The court stated:

When we consider also that claim 1 of the Hildebrandt patent, read in conjunction with the signification given the expression "alkyl radical" in the specification, embraces a very limited number of compounds closely related to one another in structure, we are led inevitably to the conclusion that the reference provides a description of those compounds just as surely as if they were identified in the reference by name. Since one of the compounds thus described is HEP, we agree with the examiner and the majority of the board that appellants' right to a patent thereon is barred under 35 USC 102(b).

Schaumann, 572 F.2d at 316-17.

The Examiner does not explain, and it is not apparent, why the Court's rationale in *Schaumann* regarding the very limited number of structurally closely related species within "lower alkyl radical" should apply to Tsubakimoto's preparation of an aqueous solution containing acrylate salt monomer, particularly when Tsubakimoto does not actually disclose a genus of preparative methods but, rather, is silent as to the form of the initial acrylate salt. The Examiner's argument that Tsubakimoto "teaches a small genus (two species in this application)" (Ans. 7) is a conclusion that lacks evidentiary support on this record that those of ordinary skill in the art would have understood Tsubakimoto to teach a small genus. Findings of fact must be based on evidence: accordingly the Examiner's conclusion is incorrect.

Conclusion of Law

The Appellants have shown reversible error in the Examiner's determination that Tsubakimoto discloses, expressly or inherently, dissolving or dispersing solid sodium acrylate in an aqueous medium (claim 1), or dissolving solid sodium acrylate in water (claim 9).

Response to Dissent

The dissent errs in stating that "[t]he issue turns on whether the description of the invention in Tsubakimoto places a person of ordinary skill in the art in possession of the sodium acrylate containing aqueous medium, utilized in the process of Tsubakimoto". The issue is whether Tsubakimoto describes, expressly or inherently, dissolving or dispersing solid sodium acrylate in an aqueous medium, *see Corning*, 868 F.2d at 1255-56, not whether Tsubakimoto puts one of ordinary skill in the art in possession of the sodium acrylate-containing aqueous medium disclosed therein.

The cases relied upon by the dissent pertain to enablement by a reference of what the reference discloses, not enablement to do something the reference does not disclose such as, in the present case, use solid sodium acrylate.

In *In re Elsner*, 381 F.3d 1125, 1128 (Fed. Cir. 2004) the Court opined that a printed publication that disclosed a reproducible plant variety, but did not enable making it, was rendered enabling by a foreign sale of the reproducible plant variety.

In *In re Wiggins*, 488 F.2d 538, 543 (CCPA 1973) the Court held that a published article that disclosed the formula of a class of chemical compounds, without describing how to make the compounds, was not an enabling disclosure and, therefore, did not render the compounds “described in a printed publication” under 35 U.S.C. § 102(b). In the portion of *Wiggins* relied upon by the Dissent the Court stated in dicta that “a reference describing an oil refinery need not describe how to make bolts and rivets in order to be considered ‘enabling’.” *Wiggins*, 488 F.2d at 543. That dicta is not applicable to the present case because in the *Wiggins* dicta the oil refinery was described in the reference, whereas in the present case the reference does not disclose solid sodium acrylate.

In *In re Samour*, 571 F.2d 559, 562-63 (CCPA 1978) the Court held that the Doran reference that disclosed a structural formula for 1,3-dimethoxymethyl phenobarbital (DMMP) but did not disclose how to make it did not put DMMP in possession of the public, but that a combination of Doran and other references that taught how to make similar compounds put DMMP in possession of the public, thereby rendering DMMP described in Doran under 35 U.S.C. § 102(b). Unlike *Samour*, the use of solid sodium

acrylate in Tsubakimoto's process is not described by Tsubakimoto. Thus, the Court's decision in *Samour* does not indicate that Tsubakimoto puts the use of solid sodium acrylate in that process in possession of the public even if it was known in the art how to make solid sodium acrylate.

Hence, we are not persuaded by the dissent of error in our decision to reverse the rejection under 35 U.S.C. § 102(b).

Rejection under 35 U.S.C. § 103

Issue

Have the Appellants shown reversible error in the Examiner's determination that Tsubakimoto would have rendered *prima facie* obvious, to one of ordinary skill in the art, dissolving or dispersing solid sodium acrylate in an aqueous medium, where the solid sodium acrylate is anhydrous (claim 6) or has a water content from 0.1% to 10% by weight (claim 7)?

Analysis

The Appellants do not rely upon the limitations in claims 6 and 7 for the patentability of those claims but, rather, argue that Tsubakimoto fails to suggest the use of solid sodium acrylate required by claim 1 from which claims 6 and 7 depend (Br. 15). Tsubakimoto, the Appellants argue, discloses the "standard prior art method of preparing an SAP [superabsorbent polymer], wherein a solution of AA [acrylic acid] is partially neutralized with sodium hydroxide to provide a monomer solution containing sodium acrylate and unneutralized AA" (Br. 11).

Tsubakimoto discloses that if necessary to make the proportion of alkali metal acrylate 100 mol% and the proportion of acrylic acid zero, "a

base, such as an alkali metal hydroxide, for neutralizing acrylic acid may be used in a proportion of at least one mole per mol of the acrylic acid" (col. 3, ll. 30-33). Tsubakimoto, however, does not disclose that the alkali metal acrylate other than that formed by neutralizing acrylic acid to raise the proportion of alkali metal acrylate to 100% is formed in that manner.

Because Tsubakimoto does not limit the form in which the sodium acrylate originates, Tsubakimoto would have led one of ordinary skill in the art, through no more than ordinary creativity, to use sodium acrylate in any form known to be suitable for forming the aqueous sodium acrylate solution. *See KSR Int'l. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (In making an obviousness determination one "can take account of the inferences and creative steps that a person of ordinary skill in the art would employ"). One such form is solid sodium acrylate which, the Appellants acknowledge, was described in the literature and is very readily soluble in water (Spec. 2:14-15, 40). Hence, the use of solid sodium acrylate as the source of the sodium acrylate in Tsubakimoto's process would have been *prima facie* obvious to one of ordinary skill in the art.

The Appellants argue further that their Example 1 and Comparative Example 1 show that the use of solid sodium acrylate provides an unexpected reduction in residual acrylic acid monomer and improved white color compared to sodium acrylate prepared *in situ* (Br. 14; Reply Br. 4).

For the following reasons the Appellants' evidence is not effective for overcoming the *prima facie* case of obviousness.

First, the Appellants' showing of unexpected results does not provide a comparison of the claimed invention with the closest prior art. *See In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991); *In re De Blauwe*,

736 F.2d 699, 705 (Fed. Cir. 1984). Tsubakimoto is the closest prior art, and the Appellants have not established that their Comparative Example 1, which includes a hydroquinone monomethyl ether stabilizer not disclosed by Tsubakimoto, is a suitable proxy for Tsubakimoto. Moreover, Comparative Example 1 does not disclose the relative proportions of sodium acrylate and acrylic acid resulting from the initial neutralization, and the Appellants have not shown that Comparative Example 1 is closer prior art than Tsubakimoto.

Second, it is not enough for the Appellants to show that the results for the Appellants' invention and the comparative examples differ. The difference must be shown to be an unexpected difference. *See In re Freeman*, 474 F.2d 1318, 1324 (CCPA 1973); *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). In particular, the Appellants have not established that it would have been unexpected that a lower level of residual acrylic acid monomer would have been obtained starting from solid sodium acrylate monomer, rather than by neutralizing acrylic acid monomer. Ordinary purification of sodium acrylate would be expected to remove much, if not all, of the residual acrylic acid. Thus, in the absence of such an explanation, we find the Appellants' argument implausible.

Third, the evidence is not commensurate in scope with the claims. *See In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); *In re Clemens*, 622 F.2d 1029, 1035 (CCPA 1980). The Appellants' methods covered by independent claims 1 and 9 encompass including monomers other than sodium acrylate; dependent claims 2 to 4 encompass including monomers other than sodium acrylate and acrylic acid; dependent claim 5 encompasses including monomers other than sodium acrylate and 0.01 to 5 mol% of a monomer containing at least two ethylenically unsaturated bonds; and

dependent claim 10 encompasses including monomers other than another water soluble salt of acrylic acid. Yet such monomers are not used in the Appellants' comparison. We find in the evidence of record no reasonable basis for concluding that the great number of materials encompassed by the Appellants' claims would behave as a class in the same manner as the particular materials tested. *See In re Lindner*, 457 F.2d 506, 508 (CCPA 1972); *In re Susi*, 440 F.2d 442, 445-46 (CCPA 1971). Also, the Appellants' claim 1 encompasses both dissolving and dispersing the solid sodium acrylate. The Appellants' Example 1 includes only dispersing, and the Appellants have not shown that the results obtained using dispersing are representative of the results which would be obtained using dissolving.

Fourth, the cause-and-effect relationship is lost in multiple unfixed variables. *See In re Heyna*, 360 F.2d 222, 228 (CCPA 1966); *In re Dunn*, 349 F.2d 433, 439 (CCPA 1965). The Appellants' Example 1 and Comparative Example 1 differ not only in the form of the original sodium acrylate, but also in the hydroquinone monomethyl stabilizer present in Comparative Example 1 but not Example 1, and possibly in different ratios of sodium acrylate to acrylic acid in the starting reagent mixtures. The Appellants have not shown that the allegedly lower level of residual acrylic acid monomer and improved color number are not due to the particular conditions used in Example 1 and Comparative Example 1.

Conclusion of Law

The Appellants have not shown reversible error in the Examiner's determination that Tsubakimoto would have rendered *prima facie* obvious, to one of ordinary skill in the art, dissolving or dispersing solid sodium acrylate in an aqueous medium, where the solid sodium acrylate is

anhydrous (claim 6) or has a water content from 0.1% to 10% by weight (claim 7).

Claim 1 is Unpatentable as a Matter of Law

Claims 6 and 7 depend from independent claim 1. The Appellants do not contest that Tsubakimoto is prior art to all three claims. Although the Examiner did not expressly reject claim 1 as obvious in view of Tsubakimoto, if narrower dependent claims 6 and 7 are unpatentable in view of Tsubakimoto, broader independent claim 1 cannot be patentable in view of Tsubakimoto. *Cf. Ormco Corp. v. Align Technology*, 498 F.3d 1307, 1319-1320 (Fed. Cir. 2007) in which the Federal Circuit rejected an argument that independent claims 1 and 11 of the '548 patent were patentable over prior art notwithstanding an earlier ruling by the court that dependent claims 10 and 17 were unpatentable over that art. The court explained: "In *Ormco I* [*Ormco Corp. v. Align Technology*, 463 F.3d 1299 (Fed. Cir. 2006)], this court decided that claims 10 and 17 of Align's '548 patent were invalid as obvious. Claim 10 is dependent on independent claim 1, and claim 17 is dependent on independent claim 11. Because claims 10 and 17 were found to have been obvious, the broader claims 1 and 11 must also have been obvious." (Notably, in *Ormco I*, the Federal Circuit did not comment on the patentability of claims 1 and 11, as they were not then at issue. *Ormco I*, 463 F.3d at 1303.) The present facts are similar, in that the Appellants have been notified of the basis of rejection of dependent claims 6 and 7, and, being represented by a practitioner registered to practice before the United States Patent and Trademark Office in patent cases, cannot have failed to notice that the expressly rejected dependent claims depend from claim 1. Under these circumstances, we cannot say that

the Appellants have not been given effective notice that the subject matter of claim 1 is unpatentable in view of Tsubakimoto.

Accordingly, we AFFIRM the rejection of claim 1 as obvious over Tsubakimoto.¹

OWENS, *Administrative Patent Judge*, dissenting in part.

I disagree with the decision to affirm a rejection of claim 1 that has not been made. Unlike the court in *Ormco*, whose task was to decide patentability in litigation, our task, as set forth in 35 U.S.C. § 6(b), is to “review adverse decisions of examiners upon application for patents”. Because the Examiner did not make an adverse decision of claim 1 under 35 U.S.C. § 103, we should not be affirming an adverse decision of claim 1 under 35 U.S.C. § 103. A new rejection of claim 1 under 35 U.S.C. § 103 appears justified, but not an affirmation of a rejection of claim 1 under 35 U.S.C. § 103 that is not before us.

SMITH, *Administrative Patent Judge*, dissenting in part.

I respectfully dissent from the majority’s view for the following reasons.

I would affirm the Examiner’s rejection of claims 1-5 and 8-10 under 35 U.S.C. § 102(b) over Tsubakimoto.

¹ As claims 2-5, 8, and 10, which depend from claim 1, have not been rejected as obvious over Tsubakimoto, on the present record, they are unaffected by this analysis.

ISSUE

The Examiner found that Tsubakimoto describes every limitation of the invention recited in the appealed claims (Ans. 3-5). Appellants, on the other hand, contend that “[b]ecause a reference *must* teach *every* element of a claim in order for the reference to anticipate the claim, because the identical invention must be shown *in as complete a detail* as is contained in the claims, and because the ‘082 patent fails to teach or suggest using *solid* sodium acrylate to form the monomer solution, as presently claimed, the ‘082 patent cannot anticipate claims 1-5 and 8-10 (App. Br. 12).

Thus, the question presented is: Have Appellants established that the Examiner reversibly erred in rejecting the appealed claims under §102. The issue turns on whether the description of the invention in Tsubakimoto places a person of ordinary skill in the art in possession of the sodium acrylate containing aqueous medium, utilized in the process of Tsubakimoto.

FINDINGS OF FACT

1. According to the Specification, the production of solid sodium acrylate is known. (Spec. 1, ll. 9-17; 2, ll. 14-15).
2. The Specification cites GB-C-1,073,856 as describing the production of sodium acrylate. GB-C-1,073,856 discloses the resulting solid sodium acrylate is 98.3 to 99.4 % pure. .
3. GB-C-1,073,856 discloses solid sodium polyacrylates is prepared from solutions of sodium hydroxide in methanol and acrylic acid in methanol. The reference discloses that sodium

hydroxide impurities remain in the mother liquor from which the sodium acrylate is precipitated. (Page 1, ll. 52-62).

4. Solid sodium acrylate is known to be readily soluble in water. . (Spec. 2, l. 40).
5. Appellants have not asserted that it was unknown to persons of ordinary skill in the art to prepare aqueous monomer solutions or dispersions from solid sodium acrylate. (See Briefs generally).
6. The Examiner states “there are only two main ways of the preparation of an aqueous solution of sodium acrylate:
 1. mixing aqueous sodium hydroxide with acrylic acid, or
 2. dissolving commercially available solid sodium acrylate, 97%... in an aqueous medium.” (Ans. 7; Final Rejection 4).
7. Appellants did not dispute the above statements in the Briefs. (See Briefs generally).

PRINCIPLES OF LAW

On appeal to this Board, Appellants must show that the Examiner erred in finally rejecting the claims. *Cf. In re Kahn*, 441 F.3d 977, 985-986 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)); *see also* 37 C.F.R. § 41.37(c)(1)(vii).

The proper test of a publication as a § 102(b) bar is “whether one skilled in the art to which the invention pertains could take the description of

the invention in the printed publication and combine it with his own knowledge of the particular art and from this combination be put in possession of the invention on which a patent is sought.” *In re Elsner*, 381 F.3d 1125, 1128 (Fed. Cir. 2004) (*citing In re LeGrice*, 301 F.2d 929, 936 (CCPA 1962)). In particular, in view of the publication, one must be able to make the claimed invention without undue experimentation. *Elsner*, 381 F.3d at 1128.

It is well settled that prior art under 35 U.S.C. § 102(b) must sufficiently describe the claimed invention to have placed the public in possession of it. *In re Samour*, 571 F.2d 559, 562-63 (CCPA 1978). (Affirming a § 102(b) rejection based on a primary reference disclosing a claimed compound in conjunction with one or more references which teach it was known how to make that compound.)

“Every patent application and reference relies to some extent upon knowledge of persons skilled in the art to complement that disclosed in order that it be ‘enabling’ within the meaning of § 112 and to satisfy the requirements of a reference under § 102. For example, a reference describing an oil refinery need not describe how to make bolts and rivets in order to be considered ‘enabling.’” *In re Wiggins*, 488 F.2d 538, 543 (CCPA 1973).

ANALYSIS

Appellants’ principal argument in this appeal is the identical invention must be shown *in as complete a detail* as is contained in the claims, and because the Tsubakimoto fails to teach or suggest using *solid* sodium acrylate to form the monomer solution, as presently claimed, Tsubakimoto cannot anticipate. (App. Br. 12).

The proper test of a publication as a § 102(b) bar is “whether one skilled in the art to which the invention pertains could take the description of the invention in the printed publication and combine it with his own knowledge of the particular art and from this combination be put in possession of the invention on which a patent is sought.” *Elsner*, 381 F.3d at 1128. The essences of the evidentiary question here is what the disclosure of Tsubakimoto patent means to one of ordinary skill in the art. The Examiner asserted that one of main ways of the preparation of an aqueous solution of sodium acrylate is to dissolve commercially available solid sodium acrylate, in an aqueous medium. The Appellants have not refuted the Examiner's position. Appellants have not asserted that it was unknown to persons of ordinary skill in the art to prepare aqueous monomer solutions or dispersions from solid sodium acrylate. (See Briefs generally).

Appellants assert that the presently claimed invention utilizes purified solid sodium acrylate to produce the sodium acrylate polymer hydrogel. (App. Br. 8). It appears that Appellants are doing no more than utilizing the commercially available sodium acrylate discussed by the Examiner or the product of the GB-C-1,073,856 reference discussed in the background of the present Specification.²

Contrary to the position of the majority (*slip op.* 4-5), there is no requirement for Tsubakimoto to provide a genus of preparative methods for the initial acrylate salt. It is not inappropriate to rely on the knowledge of persons skilled in the art to complement that disclosed in a reference in order

² A person of ordinary skill in the art would have recognized that pure sodium acrylate would be absent of impurities that could affect subsequent reactions with the desired compound.

for that reference to satisfy the requirements of a reference under § 102. *Samour*, 571 F.2d at 562-563. As stated by the predecessor to our reviewing court “a reference describing an oil refinery need not describe how to make bolts and rivets in order to be considered ‘enabling.’” *Wiggins*, 488 F.2d at 543.

Accordingly, I would affirm the Examiner’s decision rejecting claims 1-5 and 8-10 under 35 U.S.C. § 102(b).

DECISION/ORDER

The rejection under 35 U.S.C. § 102(b) of claims 1-5 and 8-10 over Tsubakimoto is reversed, and the rejection under 35 U.S.C. § 103 of claims 1, 6, and 7 over Tsubakimoto is affirmed.

It is ordered that the Examiner’s decision is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

PL Initial:
sld

Appeal 2008-6014
Application 10/521,212

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